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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

v.

JOSEPH NIEROTKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 14, 1945.

OPINIONS BELOW

The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The opinion of the Referee of the Social Security Board, which was adopted by the Appeals Council (R. 11), appears at R. 14–28.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether "back pay" awarded pursuant to Section 10 (c) of the National Labor Relations Act constitutes "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account.

STATUTES INVOLVED

The applicable portions of the Social Security and National Labor Relations Acts are set forth in Appendix A, *infra,* pp. 12–16.

STATEMENT

The basic facts are undisputed. On August 9, 1939, pursuant to Section 10 (c) of the National Labor Relations Act (*infra,* p. 15), respondent, Nierotko, whom the National Labor Relations Board found to have been discharged by the Ford Motor Company for union activity, was ordered reinstated with "back pay" (R. 2, 4, 15–16). The Company, on July 18, 1941, paid to respondent as "back pay" for the period February 2, 1937 to September 25, 1939, the lump sum of $3,501.32 (R. 2, 4, 17). On February 27, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board rejected respondent's re-

quest that the "back pay" be credited to his Old Age and Survivors Insurance Account, the Bureau ruling that "back pay" did not constitute "wages" within the meaning of the Social Security Act (R. 41–42). In accordance with Section 205 (c) (3) of the Social Security Act, respondent then appealed to a referee, who, after hearing, affirmed the Bureau's determination (R. 14–28). The Appeals Council of the Social Security Board affirmed the referee's decision (R. 11).

Thereafter, pursuant to Section 205 (g) of the Social Security Act, respondent instituted a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, to review the decision of the Board (R. 1–3). On August 4, 1944, the district court entered summary judgment in favor of the Board (R. 47–48). On appeal, the United States Circuit Court of Appeals for the Sixth Circuit reversed (R. 53–60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that "back pay" awarded under the National Labor Relations Act constitutes "wages" within the meaning of the Social Security Act.

2. In seemingly holding that respondent is entitled to more than one "quarter of coverage",

as defined by Section 209 (g) (2) of the Social Security Act (*infra*, p. 15), for the "back pay" received, although payment of the "back pay" was made in a lump sum during a single "calendar quarter."

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Section 209 (a) of the Social Security Act (*infra*, p. 12) defines "wages" for the purpose of Old Age and Survivors Insurance Benefits, to mean "all remuneration for employment." Section 209 (b) (*infra*, pp. 12–14) in turn defines "employment" as "any service, of whatever nature, performed * * * by an employee for the person employing him." "Wages" are thus "remuneration for service performed." The Social Security Board, taking the same position as that adopted earlier by the Internal Revenue Bureau (S. S. T. 359, 1939–1 Cum. Bull. 305; Appendix B, *infra*, pp. 17–18) under the taxing provisions of the Social Security Act, held that "back pay" was not "wages," since, during the period covered by the "back pay" order, the discharged employee did not perform any service for the employer. The court below, suggesting (R. 59) that the presence of the word "service" in the definition of employment "may well have been purely fortuitous," held, however, that the rendition of services is not a prerequisite to classifying money payments as "wages" under the Social Security Act. The

court thought a literal construction of the statutory definition inconsistent with the over-all purpose of the old age benefit provisions of the Social Security Act, as well as with the purposes of the National Labor Relations Act. Proceeding on the premise that the "back pay" provision of the National Labor Relations Act undertakes to restore the unlawfully discharged employee to all the rights he would have enjoyed but for his discharge, the court below reasoned that this objective would be defeated *pro tanto* if "back pay" were not treated as "wages," since the discharged individual would then be deprived of certain Social Security benefits he otherwise would have enjoyed. The court therefore, concluded that with the Labor Act and the Social Security Act "the result of an integrated national labor policy," Congress could not have intended that the Social Security Act should deprive the unlawful discharged employee of "rights" protected by the Labor Act.

1. The correctness of the decision below is seriously open to question. Admittedly, if the term "wages" were given its dictionary meaning, it might well include "back pay." However, the Social Security Act expressly defines "wages," and "in such circumstances definition by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard*

Oil Co., 294 U. S. 87, 96; *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. 2d 561 (App. D. C.), certiorari denied May 7, 1945, No. 1124, October Term, 1944.

As noted, *supra*, p. 4, the term "wages" is defined in the Social Security Act as remuneration for "service performed," a phrase repeatedly emphasized in the statutory definition.[1] Clearly, respondent did not actually perform any service for the Ford Motor Company during the "back pay" period, and the "back pay" received was not paid as remuneration for service performed. The decisions of the courts reveal that an award of "back pay" is merely an incident to the protection of a public right. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362; *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 543; *Agwilines, Inc.* v. *Labor Board*, 87 F. 2d 146 (C. C. A. 5).[2] The employee is bound by the determination of the Board; he cannot institute proceedings to enforce the Board's order or the court's decree entered upon the Board's petition; nor can he bargain away rights given him by the order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *Stewart Die Casting*

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[1] Section 209 (b), 42 U. S. C., Sec. 409 (b); Appendix A, *infra*, pp. 12–14.

[2] Prior to actual receipt of the money, the employee has no property in the award and an assignment or attachment by creditors is ineffective. *Labor Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3); *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C. C. A. 9).

Corp. v. *Labor Board*, 132 F. 2d 801 (C. C. A. 7); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232 (C. C. A. 9). Thus, while "back pay" may be the equivalent of what the employee would have earned, it is not remuneration for his services but a device for vindicating a public right.

The court below, giving no effect to the express requirement of the Social Security Act for performance of service, stressed the Social Security Board's recognition of vacation pay, sick pay, and disability pay as "wages." But, manifestly in all such cases, the payments are voluntary and made in consideration of past or anticipated services, conditions clearly absent in the case of "back pay." Indeed, "back pay" may even be awarded to a person who has never actually been in the employ of the employer. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177. See Section 2 (3) of the Labor Act; Appendix A, *infra*, p. 15.

In holding that respondent should be made whole with respect to his employment, the court below seemingly implied (R. 55, 59) that the Social Security Board must apportion the "back pay" over the entire "back pay" period. Such a result would seem to conflict with the provisions of the Act which base the amount of an individual's benefits upon the number of calendar quarters in which he has been "paid" wages not less

than fifty dollars,[3] inasmuch as the "back pay" in the instant case was all paid in a single calendar quarter.

Such an apportionment also would impose an additional administrative burden on the Social Security Board.[4] The court below was mistaken in declaring (R. 55) that the Board makes similar apportionment with respect to wage awards under the Fair Labor Standards Act.[5]

Apart from the foregoing considerations, the correctness of the decision below is also questionable for failure to accord adequate weight to the

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[3] See 209 (g) (2); Appendix A, *infra*, p. 14.

[4] Since "back pay" normally is only received long after the "back pay" period, there would be the initial problem of adjusting the Board's records for past years. This feature aside, however, considerable difficulty would be presented in allocating "back pay" to particular calendar quarters, in those cases where the "back pay" had been reduced by the Labor Board to account for actual earnings from other employment, unjustifiable refusal to take new employment, or other factors. Again, in cases where the Board paid insurance benefits during the "back pay" period, the Board would be confronted with the problems of recouping, or adjusting the insured's account for, the amounts which the Board would have been authorized under Section 203 (d) (1) of the Act (Appendix A, *infra*, p. 12) to deduct from such benefits had the "wages" been currently received.

[5] There is set forth in Appendix C, *infra*, p. 19, a letter from the General Counsel of the Federal Security Agency in which he states that the administrative practice of the Social Security Board is to consider payment of such awards under the Fair Labor Standards Act as wages at the time they are actually paid by the employer and not to credit them as wages for the periods in which the services were performed.

uniform administrative interpretation of the Social Security Act. S. S. T. 359, 1939–1 Cum. Bull., 305 (Appendix B, *infra*, pp. 17–18); I. T. 3412, 1940–2 Cum. Bull., 174; *Matter of Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 55–56; cf. 22 Comp. Gen. 349. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift and Co.*, 323 U. S. 134, 139–140. Indeed, it may be that the decision of the Social Security Board in the instant case should be treated as conclusive, since it clearly has warrant in the record and a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *Gray* v. *Powell*, 314 U. S. 402; *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. C. A. 2); *Social Security Board* v. *Warren*, 142 F. 2d 974 (C. C. A. 8). But cf. *Trust of Bingham* v. *Commissioner*, No. 932, October Term, 1944, decided June 4, 1945.

2. While strict application of the language of the Social Security Act would seem to preclude the classification of "back pay" as "wages," a contrary result may be permissible if, as the court below suggested, emphasis is placed on the general purposes of the Social Security Act and if the Social Security Act and the Labor Act are to be viewed as expressions of "an integrated national labor policy" and interpreted as if they were *in pari materia*. For, under the Labor Act, the "back pay" order in one aspect has been conceived to be a device for "making whole" unlawfully discharged employees. Cf. *Republic Steel*

Corp. v. *National Labor Relations Board*, 311 U. S. 7; *Third Annual Report of the National Labor Relations Board*, p. 200. This objection would be partially frustrated if "back pay" were not classified as "wages" under the Social Security Act, since the employee would be denied certain Social Security benefits he would have enjoyed but for his unlawful discharge.[6] As the court below observed (R. 60), this would mean that "rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons."

Regardless, however, of the correctness of the decision below, it is of sufficient importance to the administration of the Social Security Act, the Federal Insurance Contributions Act, and the National Labor Relations Act to merit review by this Court. The court below noted that the case was "of major importance as a test case involving the status of thousands of back pay awards ordered by the National Labor Relations Board to illegally discharged employees throughout the country" (R. 54). During the period 1939–1945, 30,078 individuals received "back pay" pursuant to orders of the National Labor Relations Board

[6] The benefits lost comprise quarters of coverage which otherwise might contribute toward making him a "fully insured individual" (Sec. 209 (g)) and the quantum of the primary insurance benefit which, in turn, depends on the amount of wages received (Sec 209 (e)). See Appendix A, *infra*, pp. 14–15.

totalling $8,631,298.[7] Until the question here presented is finally settled by this Court, the social security status of these thousands of individuals and the liability of employers for social security taxes on "back pay" will remain in doubt. The Bureau of Internal Revenue does not regard the decision below as controlling, since no other circuit has yet ruled on the question, and a change in the Bureau's ruling would be subject to challenge by employers resisting the collection of taxes on "back pay." The Social Security Board, therefore, finds itself in an awkward position, for, if the Board should follow the decision below, the Board would be paying benefits to a large number of persons in cases where no taxes had been collected. Contrawise, should the Board refuse to follow the decision below in other circuits, the Board would be subjected to a flood of litigation to compel wage credits for "back pay."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.

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[7] The above statistics, supplied by the Labor Board, only include cases which the Board considers as closed. We are advised by the Board that in three cases not yet formally closed, it is estimated that some 8,000 additional individuals have already received over $3,000,000 in "back pay."

APPENDIX A

STATUTES INVOLVED

1. Title II of the Social Security Act (49 Stat. 622, as amended, 53 Stat. 1362, 42 U. S. C. Sec. 401 *et seq.*) provides in part as follows:

> SEC. 203. *Reduction and increase of insurance benefits.* * * *
>
> (d) Deductions, in such amounts and at such time or times as the Board shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits for any month in which such individual:
>
> (1) rendered services for wages of not less than $15; or
>
> * * * * *
>
> SEC. 209. *Definitions.*
>
> When used in this title—
>
> (a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *
>
> (b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irre-

spective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed or in connection with a vessel not an American vessel by an employee, if the employee is employed on and in connection with such vessel when outside the United States;

(6) Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code by virtue of any other provision of law;

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1410 of the Internal Revenue Code;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; * * *.

* * * * *

(e) The term "primary insurance benefit" means an amount equal to the sum of the following—

(1) (A) 40 per centum of the amount of an individual's average monthly wage if such average monthly wage does not exceed $50, or (B) if such average monthly wage exceeds $50, 40 per centum of $50, plus 10 per centum of the amount by which such average monthly wage exceeds $50 and does not exceed $250, and

(2) an amount equal to 1 per centum of the amount computed under paragraph (1) multiplied by the number of years in which $200 or more of wages were paid to such individual. Where the primary insurance benefit thus computed is less than $10, such benefit shall be $10.

* * * * *

(g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in

which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. * * *

* * * * *

2. The National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) provides in part as follows:

SEC. 2. *Definitions.*

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 10 (c). * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

APPENDIX B

INTERNAL REVENUE INTERPRETATION

S. S. T. 359, 1939–1 Cum. Bull. 305 of the Bureau of Internal Revenue, reads in part as follows:

> Advice is requested whether payments made to employees of the M Company, who had been discharged and who were reinstated pursuant to an order issued by the National Labor Relations Board, constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.
>
> * * * * *
>
> As indicated above, for purposes of the National Labor Relations Act, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". However, it does not follow that the sum of money paid to that individual upon reinstatement pursuant to an order of the Board constitutes *remuneration for services performed by an employee for his employer* for the purpose of the taxing provisions of the Social Security Act. Such employee has actually performed no services for which such payments are made, and the employer has done all within his power to terminate the employment relation, at least temporarily. Furthermore, the individual has no right

to demand any compensation from the employer for that period, and it is within the discretion of the Board to decide whether reinstatement shall be with or without back pay, depending on the circumstances in the particular case.

* * * * *

It is held that the payments in question made to employees of the M Company do not constitute *remuneration for services performed by an employee for his employer*, but are payments to the employees on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services to the M Company. Accordingly, such payments do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

APPENDIX C

LETTER FROM SOCIAL SECURITY BOARD

FEDERAL SECURITY AGENCY,
WASHINGTON, *August 8, 1945.*

SOLICITOR GENERAL OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

Re: *Joseph Nierotko* v. *Social Security Board* (United States Circuit Court of Appeals, Sixth Circuit, Civil No. 9896).

DEAR SIR: Reference is made to the opinion of the Circuit Court of Appeals in the above-entitled case in which it has been held that back pay awarded to an employee by the National Labor Relations Board constitutes "wages" within the meaning of the Social Security Act. We have been informed that in preparing your brief for application for writ of certiorari with the Supreme Court of the United States, you have been disturbed by the statement in the opinion, "That such difficulties are not insuperable [administrative difficulties in treating back pay as current wages during the period of unlawful discharge] is demonstrated by its [the Board's] practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court decree." You have inquired to ascertain how,

in fact, the Social Security Board does credit such payments to the wage record of an employee.

We wish to point out, first, that payments ordered by the Wage and Hour Division of the Department of Labor represent the difference between wages paid by an employer for services rendered and the legal minimum wage payable under the Fair Labor Standards Act for services rendered. In considering such payments as "wages" the Social Security Board has always recognized that they are granted as remuneration for service and hence fall within the definition of "wages" in section 209 (a) of the Social Security Act, as amended.

Although such payments are "wages," the Social Security Board has not credited them to the wage records of the employees in the manner suggested by the court in its opinion. They are not credited to the periods for which they are paid or in which the services were performed. Under the provision of section 209 (g) of the Social Security Act, as amended, a quarter of coverage is a calendar quarter during which "wages" of not less than $50 are paid. Under the present terms of the Act, these payments are considered to be wages paid at the time when the employer actually pays over the money pursuant to administrative order or court decree.

We deem it advisable, however, to call to your attention that for purposes of deductions from benefit payments to beneficiaries, wage payments ordered pursuant to the provisions of the Fair Labor Standards Act will cause deduction for the month in which the beneficiary rendered services

when the bonus payment, together with amounts received for such services in that month, are equal to wages of more than $14.99. If the amount paid in any such month, together with the back wages allocable thereto, is in excess of $14.99, deductions under either section 203 (d) or section 203 (e) of the Social Security Act, as amended, are required. Allocation in this instance is necessitated by the language of the Act which reads: "* * * for any month in which such individual: (1) rendered services for wages of not less than $15; * * *."

We trust that this information will be of assistance to you.

Sincerely yours,

JACK B. TATE,
General Counsel.

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